W.D. 63377

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI
Plaintiff/Respondent

v.

WILLIAM DUNN,
Defendant/Appellant

Appealed from the Circuit Court
of Andrew County, Missouri
The Honorable Michael J. Ordnung, Judge,
Circuit Court No. 03-CR-72815

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from the trial court's bench trial verdict on a misdemeanor criminal case, as well as its rulings on the Defendant, Mr. Dunn's, motions for judgment of acquittal and for judgment of acquittal notwithstanding the verdict.

This criminal case does involve, in one of three points relied on, the validity of a statute of this state. It does not, however, involve the validity of a treaty or statute of the United States, nor the validity of a provision of the Constitution of this state. The jurisdiction of this appeal, therefore, is vested in the Missouri Supreme Court, pursuant to Article V, § 3 of the Constitution of the State of Missouri, as the judgment appealed from involves the validity of a state statute. A motion for transfer to the Missouri Supreme Court pursuant to Article V, § 11 of

the Missouri Constitution is filed simultaneously with this brief.

If this Court were to find, however contrary to Mr. Dunn's reasonable belief, that his constitutional claim is not "colorable," this Court has jurisdiction pursuant to Article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

Background Facts

This case concerns an auto accident involving a school bus and two other vehicles. Prior to the accident, Mr. Dunn, the driver of the bus involved, had no prior accidents or driving citations, either driving a bus or his own personal vehicle. (Tr. 74). On the day of the accident, he had gotten off early from driving for St. Joseph, Missouri public schools and, because Savannah, Missouri's public schools needed help with drivers, he volunteered. (Tr. 73). The underlying facts of the accident are detailed further below.

After the accident, the State filed a misdemeanor information (LF 1) charging Mr. Dunn with violation of Section 304.050(4). That information was eventually

amended, though the added charges in the amendment were dismissed on the day of trial. (LF5 and 6; Tr. 11). The pertinent sections of both informations states as follows:

> . . . that the defendant, a school bus driver engaged in discharging his duties as such in violation of Section 304.050, RSMo, committed the Misdemeanor of loading and unloading passengers from a school bus on a public highway or road where the school bus was not plainly visible for 300 feet to drivers from each direction on said highway, punishable upon conviction under Section 304.570, RSMo, in that on or about November 8, 2002, in the County of Andrew, State of Missouri upon or near County Road 341 on Route D did unlawfully unload passengers where bus was not visible for 300 feet to drivers of other vehicles on said highway.

(LF 1 and 5).

Mr. Dunn filed a motion to dismiss approximately four months prior to trial, on April 22, 2003, asserting that this portion of the statute was vague and ambiguous. (LF 8 and 15). The trial court denied this motion. (LF 8).

The State's Evidence

Trooper Andrew Tourney of the Missouri State Highway Patrol testified that he was on duty on November 8, 2002. (Tr. 16 and 18). Upon arrival at the scene

of the accident, he saw a vehicle in flames and a school bus that had been rear-ended by another vehicle. (Tr. 22 and 27). The accident occurred on "Route D," a "two-lane state lettered road," just south of 341, according to Trooper Tourney. He described Route D as "Very hilly. Just a back road." (Tr. 19 and 22). The speed limit "in that area" is 55 miles per hour, he testified. (Tr. 19).

The Trooper took a statement from Mr. Dunn, who related the following:

> He indicated that it was his first day driving this route. That he had missed a stop and the kids had yelled to him. And he stopped and let the girl off **and then pulled forward** and was rear-ended. (Tr. 26). (Emphasis added).

Trooper Tourney measured the distance from the rear of the school bus to the crest of the hill to the north of the bus, which he testified was "at approximately the location of Road 341," to be 216 feet. (Tr. 27 - 29).

He did not, however, see any passengers discharged from the bus at the location where the bus was parked following the accident. (Tr. 31).

The State's next witness, Greg Rost, testified that he was traveling north on Route D when he came upon the accident "just after the wreck happened." (Tr. 38). He admitted that he did not witness his daughter, Sarah, being discharged from the bus. (Tr. 53). Over objection that the testimony was hearsay, he testified that his daughter, who had been on the bus, later told him where she was

discharged. (Tr. 47 - 50). He testified, again over a hearsay objection, that he measured "approximately 250 feet" from the crest of the hill to that point. (Tr. 50 - 51). In response to the objection, the trial court stated:

> Well, I'll take it subject to the objection at this point in time and with the understanding that where he was told she got off the bus is hearsay.

(Tr. 50).

Sarah Rost, a fifteen-year-old and the bus passenger for whom the bus was stopped, testified that her regular bus stop is "right at the gravel road on 341." (Tr. 55). She testified that 341 is "right at the very top of the hill" (Tr. 55 - 56), but that Mr. Dunn missed her stop and "stopped at the bottom of the hill." (Tr. 56). He "started to brake . . . right on top of [the hill], and then he continued to do it until he came to a stop," she testified. (Tr. 67). On cross-examination, she admitted that she had previously testified at deposition that the bus had stopped "Enough to — after I got off I could not see oncoming traffic for quite a while," not that the bus had stopped at the bottom of the hill. (Tr. 58). After she disembarked from the bus, Ms. Rost began walking on the gravel shoulder of the road north, up the hill toward 341, she testified. (Tr. 56 and 57).

The bus did not move after she was let off (Tr. 58), she testified, and she knew this because she "didn't hear anything." (Tr. 59). She later testified that she

"would have heard the engine going and then taking off" if the bus had moved. (Tr. 61).

When she was "about to the very top of the hill," she saw "two trucks come over the hill." (Tr. 59). She was about 10 feet from the gravel road when the first white truck came over the hill. (Tr. 64).

Mr. Dunn filed a motion to dismiss on the basis that RSMo 304.050 is "vague, ambiguous and overbroad, violating his constitutional rights to due process of law under the Sixth and Fourteenth and Fifth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution," which was denied. (LF 8, 15 and 19). He also moved to dismiss on the basis that the State did not prove beyond a reasonable doubt that at the time Mr. Dunn discharged a passenger the bus was not visible from a distance of 300 feet. (Tr. 70). The Court also denied this motion. (Tr. 71 - 72).

Defense Testimony

Just prior to the accident, Mr. Dunn had left a stop and was proceeding on the bus route, heading south on Route D, he testified. (Tr. 74 - 75). He was not going full speed, no more than 45 m.p.h., because of hills and curves. (Tr. 76). He asked the young lady behind him where the next stop was and she said it was "on up a little ways, but it's on the right." (Tr. 74). Being unfamiliar with the area, he

drove “a little more cautiously,” he testified. (Tr. 74). As he approached the hill at the junction of County Road 341 with Route D, he again asked the young lady behind him where to stop and she said, “That’s it” after he had passed the stop. (Tr. 74). Mr. Dunn testified that his actions were then as follows:

> So I began to put on the brakes and slowed the bus down and just came up over the hill and the bus stopped. I let her [Sarah Rost] off and watched her proceed back to her driveway and then I let my foot off the brake and was asking the child behind me where the next stop was and then that’s when I seen a red vehicle coming up in my rearview mirror.

(Tr. 75).

The bus was stopped “just over the hill,” he testified, 40 or 50 feet from the crest of the hill. (Tr. 76 - 77). He watched Ms. Rost in his rearview mirror and when she reached her driveway, he “started doing a rolling start, asking the child behind me where the next stop was.” (Tr. 78) The child was talking to her friends, but eventually informed him the next stop was “on up a ways.” (Tr. 79). He was about halfway down the hill when he saw the red vehicle coming in the rearview mirror. (Tr. 79). It was accelerating “at a pretty good speed,” so he “got on [his] accelerator so he wouldn’t rear-end me.” (Tr. 80). As soon as the red Jeep came up to his left side, he braked to avoid the red Jeep clipping the front end of the bus,

he testified. (Tr. 80). He saw the Jeep hit the embankment, flip and land at the bottom of the hill. (Tr. 80). He then pulled the bus over as far as he could off the road, which did not have a shoulder. (Tr. 80). At that point, he estimated he was 20 to 30 feet from the overturned Jeep. (Tr. 81).

He called the dispatcher to request emergency vehicles and then tried to get the bus further off the road. (Tr. 80 - 81). The Jeep, however, caught fire (Tr. 83), so he did not proceed further because he was concerned the Jeep might explode and there was debris on fire in the road from the Jeep. (Tr. 84, 93). Then, he saw a blue pickup come up over the hill, heard screeching of brakes and tires, and the pickup ran into the back of the bus. (Tr. 82).

Mr. Dunn testified that he could see everything behind him when he stopped in the highway, so it did not make him nervous to stop. (Tr. 91). He believed he did everything correctly in the situation. (Tr. 90).

Bastian Rosmolen, an 18-year-old St. Joseph, Missouri resident, was driving home from school in a 1990 Jeep Cherokee on November 8, 2002. (Tr. 96 - 97). He testified that, "As I topped the hill, at the very top I saw a school bus." (Tr. 98). He hit his brakes, realized he wouldn't stop in time and swerved left. He testified that <u>at that time</u>, the bus was far enough over the hill that he could not see it until he reached the top. (Tr. 98 - 100).

Candy Frakes, the safety director for Laidlaw Transit, is certified as an accident reconstructionist. (Tr. 102 - 103). She was informed of the accident and came to the scene, where she saw the vehicle that rear-ended the bus and saw the burnt Jeep. (Tr. 104). After attending to the children to make sure they were alright, she marked the roadway where all three vehicles were located. (Tr. 105 - 107). She also measured the skidmarks of the vehicle that rear-ended the bus. (Tr. 107). She then took Mr. Dunn in to be drug tested and alcohol tested, and the results of those tests were negative. (Tr. 109).

Mr. Dunn and Candy Frakes went out to the scene of the accident soon after the accident and Mr. Dunn stopped the bus at the same point where he had let Ms. Rost off. (Tr. 85). Ms. Frakes testified that she measured the distance from the bus to the driveway at the crest of the hill and the rear of the bus was 53 feet past the driveway. (Tr. 110). She took photos from her car 300 feet from the bus and the bus was visible in both photos, she testified. (Tr. 113 - 114). Those photos were admitted as Exhibit A. (Tr. 118).

The night before trial, in attempting to again recreate where he had stopped, Mr. Dunn stopped the bus at the exact same spot again, as revealed by marks Ms. Frakes had previously made, even though he couldn't see the marks from the bus. (Tr. 85; 114 - 115). She parked her vehicle 163 feet north of the center of the drive

and when she stood beside the bus she could see the top of the vehicle to the north. (Tr. 115 - 116). She testified that she is five foot nine inches tall, and the top of the bus is 117 inches tall (nine foot nine inches, four feet taller than she is). (Tr. 115, 117).

Arguments On Post-Trial Motion

After the defense rested, Mr. Dunn filed a motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial, on the same basis as argued in his motion to dismiss, and also on the basis that the trial court erred in overruling the motions for judgment of acquittal at the close of the state's evidence and the at the close of all evidence. (LF 23 and 24).

Defense counsel argued that the prosecution had not proven that Mr. Dunn stopped the bus and let off Ms. Rost at a point with less than 300 feet visibility. (Tr. 121 - 122). The prosecution argued that the measurements taken by Trooper Tourney and Mr. Rost to the top of the hill established that there was not 300 feet of unimpeded visibility. (Tr. 122).

On September 30, 2003, a hearing was held on Mr. Dunn's motion for judgment of acquittal or, alternatively, for new trial. (Tr. of hearing 1). Again, counsel for Mr. Dunn argued that RSMo § 304.050(4) is a "run-on sentence" that is unclear and ambiguous, failing to put people on fair notice of what the law is, because people of ordinary intelligence could not discern its meaning. (Tr. of hearing 2, 3). Also, counsel argued that the statute did not apply to the facts of the instant case, because the statute addresses situations involving four or more lanes of traffic and the evidence was that Route D is a two lane road. (Tr. of hearing 2; 10). Finally, counsel argued that no witnesses testified where the bus was located at the time Ms. Rost was dropped off with less than 300 feet of visibility to approaching traffic. (Tr. of hearing 4 - 5). The only witness who testified as to the bus' location at the time Ms. Rost was dropped off, counsel argued, was Ms. Rost, whose testimony was unreliable because it conflicted with her prior sworn deposition testimony, counsel argued. (Tr. of hearing 6).

The court overruled the motion, based on: 1) Sarah Rost's testimony that she was let off near the Long Branch Road, which the trial judge stated was more than 60 or 70 feet past the crest of the hill, based on his own experience; 2) the driver of the Jeep (Mr. Rosmolen) testifying that "the bus was over the crest of the hill and he couldn't see it from the crest of the hill"; 3) Mr. Rost testified that when

he went past the bus, it was not moving and Ms. Rost testified that "she doesn't think the bus moved . . ."; 4) testimony and his personal knowledge that "until you're at the crest you're not going to see over that crest. (Tr. 124 - 125; LF 9).

The Court found Mr. Dunn guilty of violation of RSMo 304.050 and imposed a fine of $250.00. (Tr. 125; LF 30 and 31; Tr. of hearing 11). Subsequently, Mr. Dunn filed a timely notice of appeal on October 10, 2003. (LF 32).

POINTS RELIED ON

I. The trial court erred in finding Mr. Dunn guilty and in not granting judgment of acquittal because RSMo § 304.050(4) violates Mr. Dunn's constitutional rights to due process under the U.S. and Missouri Constitutions by being so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application," in that the pertinent language is a run–on sentence that appears to apply only to "highways" consisting of four or more lanes of traffic, the words "plainly visible" do not provide sufficient guidance so as to avoid arbitrary and discriminatory application, a person of ordinary

intelligence must guess as to whether a 300 or 500-foot distance applies and the distances are impossible to determine except in retrospect.

II. The trial court erred in finding Defendant guilty and in not granting judgment of acquittal because no violation of the statute occurred here, in that the statute applies only to "highways" and, in particular, to "four lane highways," and the State did not demonstrate Route D was a highway, much less that it has four lanes.

III. The Trial Court Erred In Finding Mr. Dunn Guilty And Not Granting Judgment Of Acquittal, Because The State Failed To Prove That Mr. Dunn Discharged Passengers At A Location Where The Bus Was Not "Plainly Visible" For At Least Three Hundred Feet In Each Direction To Drivers Of Other Vehicles, Failed To Prove Which Distance Applied Under The Circumstances And The Trial Court Took Judicial Notice Of Facts Not In Evidence, In That No Witness

Testified To The Precise Location Of The Bus When A Passenger Was Discharged, The Only Admissible Measurement Was Taken After The Accident And After The Bus Was Moved, The Measurement Was Taken To An Imprecise Location At "The Crest Of The Hill," There Was No Evidence A Driver Of A Vehicle Over the Hill Could Not Have Seen A Ten-Foot Tall Bus, The Only Testimony As To Which Distance Applied Was That There Was A 55 M.P.H. Speed Limit "In That Area" And The Trial Court Based Its Decision On "Personal Knowledge" Of The Accident Scene.

ARGUMENT AND AUTHORITIES

I. The trial court erred in finding Mr. Dunn guilty and in not granting dismissal or judgment notwithstanding the verdict because RSMo § 304.050(4) violates Mr. Dunn's constitutional rights to due process under the U.S. and Missouri Constitutions by being so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application," in that the pertinent language is a run–on sentence that appears to apply only to "highways" consisting of four or more lanes of traffic, the words "plainly visible" do not provide sufficient guidance so as to avoid arbitrary and discriminatory

application, a person of ordinary intelligence must guess as to whether a 300 or 500-foot distance applies and the distances are impossible to determine except in retrospect.

A. Standard of Review

Review of legal determinations is *de novo*, and issues involving the interpretation of statutory language are questions of law. *Lakin v. Gen. Am. Mut. Holding Co.*, 55 S.W.3d 499, 503 (Mo.App. W.D. 2001). In cases involving questions of law, the appellate courts review the trial court's determination independently, without deference to that court's conclusions. *Id.*

B. The pertinent portion of RSMo § 304.050(4) is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."

Mr. Dunn filed a motion to dismiss approximately four months prior to trial, on April 22, 2003, asserting that this portion of the statute was vague and ambiguous,. (LF 8 and 15). The trial court denied this motion. (LF 8).

Section 304.050(4) RSMo states as follows:

> Except as otherwise provided in this section, the driver of a school bus in the process of loading or unloading students upon a street or highway shall activate the mechanical and electrical signaling devices, in the manner prescribed by the state board of education, to communicate to drivers of other vehicles that students are loading or unloading. A public school

district shall have the authority pursuant to this section to adopt a policy which provides that the driver of a school bus in the process of loading or unloading students upon a divided highway of four or more lanes may pull off of the main roadway and load or unload students without activating the mechanical and electrical signaling devices in a manner which gives the signal for other drivers to stop and may use the amber signaling devices to alert motorists that the school bus is slowing to a stop; provided that the passengers are not required to cross any traffic lanes and also provided that the emergency flashing signal lights are activated in a manner which indicates that drivers should proceed with caution, and in such case, the driver of a vehicle may proceed past the school bus with due caution. **No driver of a school bus shall take on or discharge passengers at any location upon a highway consisting of four or more lanes of traffic, whether or not divided by a median or barrier, in such manner as to require the passengers to cross more than two lanes of traffic; nor shall any passengers be taken on or discharged while the vehicle is upon the road or highway proper unless the vehicle so stopped is plainly visible for at least five hundred feet in each direction to drivers of other**

vehicles in the case of a highway with no shoulder and a speed limit greater than sixty miles per hour and at least three hundred feet in each direction to drivers of other vehicles upon other highways, and on all highways, only for such time as is actually necessary to take on and discharge passengers.

(Emphasis added).

As can readily be seen, the relevant provision of the statute is a run-on sentence with a meaning that is difficult, if not impossible, to discern. As such, the statute is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, which violates Mr. Dunn's due process rights.

The Fourteenth Amendment and Article I, Section 10 of the Missouri Constitution both provide that no person shall be deprived of life, liberty or property without due process of law. For this requirement to be met in this context, a statute must give a person of ordinary intelligence "a reasonable opportunity to know what is prohibited, so that he may act accordingly." *State v. Brown*, 660 S.W.2d 694, 697 (Mo. banc 1983) [citation omitted].

There are several related prongs to this "fair warning" requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or

requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 3255-56, 82 L.Ed.2d 462 (1984). Enforcement of criminal statutes which are vague or overbroad is barred, where such statutes cannot be redeemed by reference to common law or judicial construction limiting their scope. *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955 (Mo.banc 1999). Courts may not enforce such vague laws, laws that do not give fair warning of the conduct which they prohibit. *State v. Young*, 695 S.W.2d 882 (Mo.1985). The criminal statute must be sufficiently definite and clear so that the potential violators know the standards of behavior to which they must adhere. *Id.* at 884.

Second, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *United States v. Lanier*, 117 S.Ct. 1219, 1225, 520 U.S. 259, 137 L.Ed.2d 432 (1997) (citations omitted).

The doctrine also ensures that guidance through explicit standards will be afforded to those who must apply the statute and thereby avoid arbitrary and discriminatory application of the statute. *Baugus v. Director of Revenue*, 878

S.W.2d 39, 41 (Mo. banc 1994).

Finally, the canon of strict construction of criminal statutes, or rule of lenity, requires that criminal statutes be construed more strictly against the State. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo.1999). [citations omitted].

Here, RSMo § 304.050(4) begins by discussing the prescribed methods of activating school bus signaling devices. Then, buried in the text is the relevant run-on sentence whose meaning defies reasonable comprehension. That sentence begins by prohibiting the discharge of passengers "upon a highway consisting of four or more lanes of traffic, whether or not divided by a median or barrier, in such manner as to require the passengers to cross more than two lanes of traffic . . ." "Highway" is not defined in the statutory scheme, but the wording suggests that a "highway" has "four or more lanes of traffic." A person of ordinary intelligence is left to wonder whether the statute, then, only applies if there are "four or more lanes of traffic."

Next, the portion of the sentence at issue states that "nor shall any passengers be taken on or discharged while the vehicle is upon the road or highway proper unless the vehicle so stopped is <u>plainly visible</u> for at least five hundred feet in each direction to drivers of other vehicles in the case of a highway with no shoulder and a speed limit greater than sixty miles per hour and at least three

hundred feet in each direction to drivers of other vehicles upon other highways, and on all highways, only for such time as is actually necessary to take on and discharge passengers." (Emphasis added).

In determining whether a statute is vague, the court must consider it in the context of the facts involved in the case, not in the abstract. *State v. Young,* 695 S.W.2d 882 (Mo. banc 1997). A person of ordinary intelligence would reasonably have several problems interpreting this portion of the statute, particularly under the facts present here:

! Does it also apply only to "four lane" highways, as the previous portion of the statute suggests?

! How is a bus driver to know if his bus is "plainly visible" to a driver of another vehicle when he obviously cannot view the bus from another's perspective?

! How can one determine what 300 feet or 500 feet is, particularly when looking into the rear view mirror of a bus (where "objects are larger than they appear")? How is a person of ordinary intelligence supposed to measure such uncommon distance measurements except, as here, in retrospect?

! What qualifies as a "highway," where that term is left undefined? Here, of course, the accident occurred on "Route D." (Tr. 19 and 22). Does that qualify as

a “highway”?

! What is the meaning of “plainly visible,” which is left undefined by the statute? Is it sufficient, as here, if a significant portion of the bus is visible to another driver from the required distance? (See Tr. 113 - 114).

! Which distance applies, the 300 or the 500 foot “plainly visible” distance? A person of ordinary intelligence would be forced under this provision to make a quick and arbitrary determination (“Let’s see, does this highway have a shoulder and a 60 mile per hour speed limit? Is that gravel a ‘shoulder’?);

! When is the distance to be measured, when the bus initially begins to stop or when it comes to a complete stop? Even if a bus driver could determine that his bus is “plainly visible” to drivers of other vehicles for the required distance, once he begins to stop, that distance closes.

! How does one comply with the statute in hilly terrain? In some hilly areas of Missouri, compliance may be either impossible or mean discharging passengers far away from their homes.

Because of these ambiguities in the statute, the very thing the due process clause is designed to protect against occurred here: Mr. Dunn was convicted of violation of the statute because the statute does not provide sufficient guidance through explicit standards to those who must apply the statute (prosecutors). See

Baugus v. Director of Revenue, 878 S.W.2d 39, 41 (Mo. banc 1994). Without sufficient guidance, the statute was applied arbitrarily and in a discriminatory fashion, as demonstrated above.

Additionally, when a statute's language is ambiguous or uncertain, the judiciary should consider extrinsic matters, such as a statute's history, surrounding circumstances and objectives to be accomplished through the statute. *Riordan v. Clark*, 8 S.W.3d 182, 184 (Mo.App. W.D. 1999). Here, even though the provision at issue was obviously designed to protect children getting on and off buses, Mr. Dunn was convicted even though no child was injured in getting on or off the bus. For all these reasons, the pertinent sentence of the statute is unconstitutional, as it violates Mr. Dunn's due process rights.

It should finally be noted that a statute is much less likely to be held vague if certain facts are present that are not present here. First, when a statute criminalizes conduct that is wrong in itself, the statute becomes less susceptible to a challenge of being void for vagueness because the evil that is being remedied is commonly understood. *State v. Bratina*, 73 S.W.3d 625, 628 (Mo. 2002). But the standard for criminal statutes where the conduct is unlawful only because it is prohibited, not because it is wrong in itself, is more exacting. *Id.* In the latter situations, which is the applicable standard here, the statute must be precise because a person would

not have a common societal understanding that he or she is committing a crime. *Id.*

A statute is also less likely to be held vague if it has an intent requirement, so that completely innocent conduct is not likely to be prohibited. *State v. Condict*, 65 S.W.3d 6 (Mo.App. S.D. 2001). Here, however, the statute has no intent requirement, thereby allowing completely innocent conduct (discharging a bus passenger) to be prohibited under certain ambiguous conditions. Under these conditions, as here, the statute must be more strictly construed against the State to avoid precisely what occurred here: a perfectly innocent man who had never had a traffic citation before, either driving a bus or in his personal vehicle (Tr. 74), was convicted of a crime he had no reason to suspect he had committed.

II. The trial court erred in finding Defendant guilty because no violation of the statute occurred here, in that the statute applies only to "highways" and, in particular, to "four lane highways," and the State did not demonstrate Route D was a highway, much less that it has four lanes.

A. Standard of Review

Review of legal determinations is *de novo*, and issues involving the

interpretation of statutory language are questions of law. *Lakin v. Gen. Am. Mut. Holding Co.*, 55 S.W.3d 499, 503 (Mo.App.2001). In cases involving questions of law, the appellate courts review the trial court's determination independently, without deference to that court's conclusions. *Id.*; *In re T.A.S.*, 62 S.W.3d 650, 658 (Mo.App.2001).

B. Section 304.050(4) RSMo applies only when a bus is on a "highway," in particular on a "four- lane highway."

The pertinent sentence of Subsection 4 begins by stating that "No driver of a school bus shall take on or discharge passengers at any location upon a highway consisting of four or more lanes of traffic . . ." (Emphasis added). It then goes on to state, "nor shall any passengers be taken on or discharged while the vehicle is upon the road or highway proper unless the vehicle so stopped is plainly visible for. . . **at least three hundred feet in each direction to drivers of other vehicles upon other highways**, and on all highways, only for such time as is actually necessary to take on and discharge passengers." (Emphasis added). The portion of the sentence in bold above is the statutory section Mr. Dunn allegedly violated.

Since the sentence begins by limiting its application to school bus drivers "upon a highway consisting of four or more lanes of traffic," two questions must

be answered. First, does the sentence apply only to "highways" and, if so, what is a "highway," since it is undefined in the statute? And second, does the sentence apply only in cases where the highway consists of four or more lanes of traffic? The answers to these questions demonstrate that the statute does not apply to the facts demonstrated by the State in this case.

1. The provision at issue applies only to "highways"

a. The rule of strict construction applies here.

The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used, and to give effect to that intent. In doing so, the Court considers the words used in their plain and ordinary meaning. *Morton v. Brenner*, 842 S.W.2d 538, 541 (Mo. banc 1992). Where the language of a statute is plain and admits of but one meaning, there is no room for construction. *L & R Distributing Company, Inc. v. Missouri Department of Revenue*, 648 S.W.2d 91, 95 (Mo.1983).

However, it must be remembered that the rule of strict construction applies here to interpreting this criminal statute. Penal provisions such as the instant one can be given "no broader application than is warranted by its plain and unambiguous terms." *City of Charleston ex rel. Brady v. McCutcheon*, 227 S.W.2d 736, 738 (Mo.banc 1950). The statute must be applied only to such

cases as come clearly within its provisions. *Cowan v. Western Union Telegraph Co.*, 149 Mo.App. 407, 129 S.W. 1066, 1067 (Mo.App. 1910). This means that:

> [T]he scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed, and not that the language of the terms shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction, but should give effect to the plain meaning of words and where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment.

Moore v. Western Union Tel. Co., 148 S.W. 157, 159 (Mo.App. 1912); *Abbott v. Western Union Telegraph Co.*, Mo.App., 210 S.W. 769 (Mo.App. 1919).

Or, as the Court stated in *State v. Getty*, 273 S.W.2d 170, 172 (Mo. 1954), "[N]o one is to be made subject to criminal prosecution by implication."

b. Applying strict construction and other rules to the provision at issue demonstrates it applies only to "highways."

Here, the portion of the statute that allegedly applied to Mr. Dunn plainly

states that when taking on or discharging passengers on a highway, a bus must be visible to other drivers from a distance of 300 feet. The State, however, may argue that, since the word "road" appears earlier in the sentence, in the part of the sentence relating to the 500-foot restriction (" nor shall any passengers be taken on or discharged while the vehicle is upon the road or highway proper unless the vehicle so stopped is plainly visible for at least five hundred feet in each direction to drivers of other vehicles in the case of a highway with no shoulder and a speed limit greater than sixty miles per hour") that "road" applies to the latter section dealing with the 300- foot restriction as well, even though that provision does not use the term "road" at all. Following this logic would, of course, violate the rule of strict construction detailed above.

Moreover, it is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it is presumed that the legislature did not insert idle verbiage or superfluous language in a statute. *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). In this case, then, from the language used it must be presumed the legislature intended to use the phrase "road or highway" when setting forth the 500-foot provision, but did not intend to use the phrase when setting forth the 300-foot provision at issue here. Any other interpretation would add language to the

provision at issue that is simply not there and would impermissibly ignore the plain language of the statute.

2. In particular, the provision at issue applies only to "four-lane highways."

It also seems apparent that the provision at issue was meant to apply not just to "highways" in general, but more particularly to "four-lane highways." As previously demonstrated, Subsection 4 begins by stating that "No driver of a school bus shall take on or discharge passengers at any location upon a highway consisting of four or more lanes of traffic . . ." (Emphasis added). Although the run-on sentence at issue goes on to refer to "highways" later, it would appear that the sentence was meant to address situations where a bus discharged or took on passengers on a four-lane highway.

A "fundamental tenet" of statutory construction, *ejusdem generis,* supports this view. This principal provides that where general words follow specific words, the general are construed to include only objects similar in nature to those enumerated specifically. *State v. Lancaster,* 506 S.W.2d 403, 405 (Mo. 1974); *Alumax Foils, Inc. v. City of St. Louis,* 959 S.W.2d 836, 838 (Mo.App. E.D.1997)

As the Court stated in *McIntyre v. Kilbourn*, 885 S.W.2d 54, 55 (Mo.App. W.D. 1994). [citations omitted].

> The rule of *ejusdem generis* holds that a general term, followed, or preceded by, an enumeration of specific terms, is limited by the nature of the specific terms and is not to be given its broadest inclusive meaning. (Emphasis added).

In *Lancaster, supra,* the statute in question prohibited the destruction of private property through the "use of bombs, dynamite, nitroglycerine *or other kind of explosives*." 506 S.W.2d at 404. The issue before the Missouri Supreme Court was whether a defendant could be found guilty of violating the statute by igniting an M-80 firecracker in a pay telephone; in other words, whether a firecracker was an "other kind of explosive." *Id.* In finding that it was not, the Supreme Court applied the statutory construction principles of *ejusdem generis,* and reasoned that "[t]here is no question that a firecracker is an 'explosive' in that it produces an explosion when ignited, but it is not a 'high explosive,' and it was not designed to produce an extreme shattering effect." *Id.* at 405. Accordingly, the Court concluded that the Legislature did not intend to include a firecracker within the term "other kind of explosives" and, therefore, reversed the defendant's conviction under the statute. *Id.*

Likewise, in this case the term "highway" follows "four-lane highway" in the sentence concerned. But, similarly, a "highway" is not a "four-lane highway" and,

therefore, it cannot be said the Legislature intended to address all highways in the sentence at issue. As the Missouri Supreme Court stated in *Regan v. Ensley*, 222 S.W. 773, 776 (Mo. 1920), "General words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms."

A definite and specific phrase or word takes precedence over the general. *Short v. Short,* 947 S.W.2d 67, 71 (Mo. App. S.D. 1997), citing *Pollard v. Board of Police Commissioners*, 665 S.W.2d 333, 341 fn. 12 (Mo. banc 1984). Where the specific terms or phrases identify a class (here, four-lane highways), the particular words restrict the meaning of the general, catchall phrase (here, highways) by treating the similar words as indicating the class and the general words as extending the provisions of the statute to everything embraced in that class. *Missouri Title Loans, Inc. v. City of St. Louis Bd. of Adjustment*, 62 S.W.3d 408, 415 (Mo.App. E.D. 2002); *Alumax Foils, Inc. v. City of St. Louis,* 959 S.W.2d 836, 838 (Mo.App. E.D.1997). Here, therefore, the specific term "four-lane highway" takes precedence over the general word "highway," restricting the meaning of the latter word to things within the class of "four-lane highways."

Another maxim of construction provides that words or phrases are known by the company they keep. *Short, supra* at 71. While this is not an inescapable

rule, it is often wisely applied to avoid the giving of unintended breadth to words or phrases that are capable of many meanings. *Id*. Here, application of this rule would mean that the word "highway" is known by the company it keeps in the sentence, "four-lane highway" and restricted in meaning by that phrase. See, also, *Pollard v. Bd. of Police Commissioners*, 665 S.W.2d 333 (Mo. 1984).

C. The State failed to prove Mr. Dunn was on a "highway" when he discharged a student from the bus, much less that he was on a "four-lane highway."

An essential element of any criminal conviction is that the conduct the defendant is accused of must fall within the confines of the conduct prohibited by the statute. See *State v. William*, 100 S.W.3d 828, 832 (Mo.App. W.D. 2003). Again, in interpreting the statute so as to determine what is prohibited, criminal statutes are strictly construed against the state and any ambiguities are resolved in favor of the defendant. *State v. Withrow*, *supra.*

Strictly construing the pertinent sentence here of Section 304.050(4) against the State and resolving any ambiguities in favor of Mr. Dunn leads to but one conclusion: the State did not prove Mr. Dunn violated the statute.

The State admits that Mr. Dunn was traveling on "Route D." (LF 5; Tr. 13). And, in fact, Trooper Tourney testified that "Route D" is a "two-lane state lettered road. Very hilly. Just a back road." (Tr. 19). Apparently believing there was no

need to demonstrate that Route D is a "highway," the State presented no evidence that Route D qualifies as a "highway" under the statute. Nor, if Route D does qualify as a highway, did the trial court take judicial notice of this "fact." In fact, it would not be permissible for the court to take judicial notice of this "fact," if that were the case, because this is a question of fact to be determined by evidentiary proof. See *State v. Thenhaus,* 117 S.W.3d 702 (Mo.App. E.D. 2003).

As for whether Route D is a four-lane highway, the evidence here was that it is not: it is a "two-lane state lettered road. . . just a back road." (Tr. 19). Therefore, if the statutory provision at issue requires proof that the bus picked up or discharged passengers on a four-lane highway, as Mr. Dunn believes it does, the State also failed to prove this element.

Unless the plain language of the statute is ignored or found not to apply, the charge against Mr. Dunn should not stand, because the State did not demonstrate he was traveling on a "highway," much less that he was traveling on a "four-lane highway," as addressed by the statutory provision in question.

D. An analogous case

The case perhaps most analogous to the instant one is *State v. Thenhaus*, 117 S.W.3d 702 (Mo.App. E.D. 2003). In that case, the driver of a vehicle

challenged the sufficiency of the evidence with respect to whether the State proved beyond a reasonable doubt that she was operating a motor vehicle on a highway while her license was suspended or revoked at the time she was stopped.

The Court found that, under the statute, driving on a "highway" was an element of the charge that the State was required to prove. As here, however, the only reference to the road the driver was operating the truck on was testimony by the police officer involved that she was spotted driving on the road. The State did not provide any further evidence with respect to whether the road was in fact a "highway" as defined by the statute relevant there, Section 302.010(6). The Court held that the trial court could not take judicial notice of the character of the road because this is a question of fact to be determined by evidentiary proof. *Id.* Because the State failed to prove beyond a reasonable doubt an essential element of the offense of driving while revoked, the Court reversed the trial court's judgment and vacated the driver's conviction. *Id.*

III. The Trial Court Erred In Finding Mr. Dunn Guilty And In Taking Judicial Notice Of Facts Not In Evidence, Because The State Failed To Prove That Mr. Dunn Discharged Passengers At A Location Where The Bus Was Not "Plainly Visible" For At Least Three Hundred Feet In Each Direction To Drivers Of Other Vehicles And

Failed To Prove Which Distance Applied Under The Circumstances, In That No Witness Testified To The Precise Location Of The Bus When A Passenger Was Discharged, The Only Admissible Measurement Was Taken After The Accident And After The Bus Was Moved, The Measurement Was Taken To An Imprecise Location At "The Crest Of The Hill," There Was No Evidence A Driver Of A Vehicle Over the Hill Could Not Have Seen A Ten-Foot Tall Bus, The Only Testimony As To Which Distance Applied Was That There Was A 55 M.P.H. Speed Limit "In That Area" And The Trial Court Based Its Decision On "Personal Knowledge" Of The Accident Scene.

A. Standard of Review

The sufficiency of the evidence in a court-tried criminal case is determined by the same standard as in a jury-tried case. *Heard v. State*, 41 S.W.3d 28, 29 (Mo.App. E.D.2001). In considering whether the evidence is sufficient to support the jury's verdict, the Court examines the elements of the crime and considers each in turn to determine whether a reasonable juror could find each of the elements beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). Under this standard, the Court is required to take the evidence in the light most favorable to the State and grant the State all reasonable inferences from the evidence, disregarding all contrary inferences. *Id.* Although the Court disregard[s] contrary inferences, it does not do so if the inferences are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *Id.* Nor will the Court supply missing evidence or give the state the benefit

of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001).

B. The State failed to prove that the bus was not "plainly visible" for at least three hundred feet in each direction to drivers of other vehicles at the time a passenger was discharged.

In order to convict a defendant of a criminal offense, the State is required, as a matter of due process, to prove beyond a reasonable doubt each and every element of the offense. *State v. White*, 92 S.W.3d 183, 192 (Mo.App. W.D.2002), overruled on other grounds, as recognized in *State v. O'Brien*, 857 S.W.2d 212 (Mo. 1993). (Emphasis added). Here, the State was required to prove, pursuant to the amended information (LF 5) that the bus was not "plainly visible" from a distance of three hundred feet in each direction to drivers of other vehicles. What the State proved, however, even giving it the benefit of all reasonable inferences, was that after the accident the bus was not 300 feet away from the crest of the hill to the north of the bus. Not one single witness testified to the precise location of the bus before the accident. And not one single witness testified that the bus was not "plainly visible" to a driver of a vehicle from a distance of three hundred feet in each direction.

The State's evidence can be summarized as follows:

Trooper Andrew Tourney testified that he measured from the bus to the

"crest of the hill" to the north of the bus, which he testified was 216 feet. (Tr. 27 - 29). There are several problems with the sufficiency of this testimony. First, of course, "crest of the hill" is an entirely imprecise point to measure to. Second, Trooper Tourney admitted that he did not see any passengers discharged from the bus at the location of the bus, post-accident, where he took the measurement. (Tr. 31). Third, nothing about this measurement demonstrates that a driver of a vehicle over "the crest" of the hill could not have seen a ten-foot tall bus. Finally, even Trooper Tourney's testimony demonstrates that the bus was not at the place where Trooper Tourney measured when a passenger was discharged.

Trooper Tourney testified that he took a statement from Mr. Dunn, who related that after he stopped to let Sarah Rost out of the bus, he pulled forward. (Tr. 26). Trooper Tourney did not question Mr. Dunn as to where on the road the bus was when Mr. Dunn let Ms. Rost off the bus, or whether he was at the crest of the hill, as Mr. Dunn later testified. In fact, he apparently asked no one where the bus was when Ms. Rost exited the bus. Nor did Trooper Tourney ask Mr. Dunn how far he had pulled forward by the time of the accident. **This is a critical omission, because Trooper Tourney's measurement was taken after the accident and after the bus had pulled forward an undetermined distance.** (Tr. 27 - 29).

Greg Rost, the father of Sarah Rost, testified that he was traveling north on the road in question when he came upon the accident "just after the wreck happened." (Tr. 38). **He, too, admitted that he did not witness his daughter, Sarah, being discharged from the bus.** (Tr. 53).

Although the following testimony from Mr. Rost must be related because the State will no doubt cite to it, the judge deemed it hearsay and apparently did not consider the evidence, as he did not cite it in summarizing the evidence supporting his ruling. (Tr. 50; 124 - 125). Over objection that the testimony was hearsay, Mr. Rost testified that his daughter, Sarah, who had been on the bus, later told him where she was discharged. (Tr. 47 - 50). He testified, again over a hearsay objection, that he measured "approximately 250 feet" from the crest of the hill to that point. (Tr. 50 - 51).

It must be noted that, contrary to the trial judge's ruling (Tr. 124 - 125), Mr. Rost <u>never</u> testified that when he went past the bus, it was not moving. Actually, he could not have testified to this, because he only came upon the bus <u>after</u> the accident. (Tr. 38).

Although Sarah Rost, the fifteen-year-old daughter of Mr. Rost and the bus passenger for whom the bus was stopped, testified that Mr. Dunn "stopped at the bottom of the hill" (Tr. 56), she did not testify that she showed her father where

Mr. Dunn stopped, nor did she testify to any measurement being made by her father at that time. (Tr. 54 - 68). She did not testify, nor could she, that the bus was not visible from a vehicle less than 300 feet away, because she was on the bus until she disembarked from it and, in fact, never even turned around to look at the bus after she left it. (Tr. 59 - 60). She testified that when she walked up the hill away from the bus, she "could not see oncoming traffic for quite a while" (Tr. 58), but this does not demonstrate that a driver of a vehicle approaching the bus could not see the bus for less than 300 feet. Additionally, her perspective is not at issue, but rather the perspective of a driver of an approaching vehicle. The top of the bus is 117 inches tall (nine foot nine inches). (Tr. 115, 117). A driver of a vehicle that Ms. Rost could not see could still see a vehicle 3 - 4 feet taller than she is. Finally, even her testimony provided no precise measurement point, only an estimate that the bus was "at the bottom of the hill."

Although there was no precise measurement point for where the bus was located when Mr. Dunn let Ms. Rost off the bus, the only other testimony on this subject was that the bus was close to or at the top of the hill when it stopped. (Tr. 75 - 77).

Ms. Rost did testify that the bus did not move after she was let off (Tr. 58), but she did not turn around to actually look at the bus and could, therefore, only

testify that she "didn't hear anything." (Tr. 59). Although she relied on the notion that she "would have heard the engine going and then taking off" if the bus had moved (Tr. 61), the prosecution's own evidence from Trooper Tourney was that Mr. Dunn stated immediately after the accident that he stopped and let Ms. Rost off **and then pulled forward** and was rear-ended. (Tr. 26). (Emphasis added).

This coincides with Mr. Dunn's testimony on the witness stand that he watched Ms. Rost in his rearview mirror and when she reached her driveway, he "started doing a rolling start, asking the child behind . . . where the next stop was." (Tr. 78 - 79). Ms. Rost's testimony is actually in agreement with this, as she stated that she was "about to the very top of the hill" (where her driveway is) when she saw "two trucks come over the hill." (Tr. 59). Thus, Ms. Rost would not have heard the engine grow louder, because Mr. Dunn did not move until Ms. Rost was near her driveway, then he began rolling downhill and, finally, accelerated. He testified that he was about halfway down the hill when he saw the red vehicle coming in the rearview mirror and, since that vehicle was accelerating "at a pretty good speed," Mr. Dunn "got on [his] accelerator so he wouldn't rear-end [him]." (Tr. 80). Thus, the reliable evidence, including that from Trooper Tourney, was that Mr. Dunn did, in fact, move the bus after letting Ms. Rost off, probably a significant distance by the time he rolled, then accelerated.

Thus, the State failed to prove that the bus was not "plainly visible" to a driver of a vehicle for at least three hundred feet in each direction when Mr. Dunn discharged a passenger, because:

1) not one witness testified that the bus was not visible to a driver of a vehicle at least three hundred feet away;

2) there was never a precise measurement taken of where the bus was at the time Ms. Rost disembarked from the bus;

3) the only admissible measurement of the location of the bus was taken after the bus moved, after the accident;

4) the only admissible measurement of the location of the bus was taken to the imprecise location of the "crest of the hill"; and

5) There was no evidence a driver of a vehicle over the hill could not have seen a ten-foot tall yellow bus.

C. The Court erred in taking judicial notice of facts not in evidence.

Finally, the State will no doubt argue that the trial judge could permissibly

take judicial notice of facts not in evidence so as to "fill in the gaps" noted in the State's testimony. The court did, in fact, rely on facts not in evidence, first finding, based on being "more than vaguely familiar" with the accident scene, that Long Branch Road was more than 60 or 70 feet past the crest of the hill (Tr. 124), then finding, based on "personal knowledge" regarding Route D, that "until you're at the crest you're not going to see over that crest." (Tr. 125).

However, such "judicial notice" is completely improper, because a court has no authority to base its judgment upon any evidence not in the record. As the Court in *McCoy v. Rawlings*, 849 S.W.2d 719, 722 (Mo.App. W.D. 1993) stated:

> [I]t is improper for a court to base its judgment on matters referred to as things of which the court took judicial notice, they not having been put in evidence.

Quoting *State ex rel. National Lead Company v. Smith*, 134 S.W.2d 1061, 1068-69 (Mo.App.1939).

Thus, the trial court could not "fill in the gaps" in the State's lack of evidence by taking judicial notice of "facts" from its "own experience." Moreover, by doing so, the trial court assumed facts not in evidence and denied Mr. Dunn any opportunity to confront the evidence against him, in violation of his Sixth Amendment right to confront and cross-examine his accusers.

D. The state failed to prove which distance (the 300 or the 500-foot distance) applied under the instant facts.

The statute sets forth two requirements, a 500-foot "plainly visible" requirement "in the case of a highway with no shoulder and a speed limit greater than sixty miles per hour" and a 300-foot "plainly visible" requirement "upon other highways." The only testimony on which of these distances applied was Trooper Tourney's testimony that there was a 55 m.p.h. speed limit "in that area," which would suggest the 300-foot limit applies. The testimony did not, however, establish the specific speed limit on the road in question, only that there was a 55 m.p.h. limit "in that area." For this additional reason, therefore, the State failed to provide proof beyond a reasonable doubt that Mr. Dunn violated the statute.

CONCLUSION

For all of the reasons outlined above, Appellant prays this Court reverse the conviction of Mr. Dunn.

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CERTIFICATION

AS TO WORD COUNT, VIRUS SCAN AND THAT DISK IS VIRUS FREE

Pursuant to Rule 84.06, Appellant hereby certifies that the word count herein, as calculated by the word count system employed, is 10682 words, and does not exceed the 31,000 word limit provided by the rule. Additionally, Appellant certifies that the disk submitted to the Court has been scanned for viruses and is virus-free.

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